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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD M. BARANCIK

Petitioner,

v.

COUNTY OF MARIN,
a Subdivision of the State of California

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES L. SIEMON*
BRIAN W. BLAESSER
SIEMON, LARSEN & PURDY
Dearborn Station
47 W. Polk Street
Chicago, Illinois 60605
(312) 939-7117
Counsel for Petitioner
*Attorney of Record

Of Counsel
BEYERS, COSTIN & CASE
917 College Avenue
PO Box 878
Santa Rosa, California 95402
(707) 545-0142

August 22, 1989

Pandick Midwest, Inc., Chicago • (312)733-6000

QUESTION PRESENTED

For purposes of applying the statute of limitations in actions brought under 42 U.S.C. § 1983 challenging a zoning classification, does the cause of action accrue from the date the existing zoning classification was originally adopted or from the date the landowner's rezoning request was denied?

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Petitioner,

v.

COUNTY OF MARIN,
a Subdivision of the State of California

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Richard M. Barancik, respectfully prays that a writ of certiorari issue to review the order and amended opinion of the United States Court of Appeals for the Ninth Circuit entered on June 16, 1989.

OPINIONS BELOW

The Order and Amended Opinion of the Court of Appeals appears in Appendix B to this petition. The Opinion and Order of the United States District Court for the Northern District of California appears in Appendix C.

JURISDICTION

The initial opinion of the Court of Appeals for the Ninth Circuit was filed on June 30, 1988. A timely petition for rehearing with suggestion for rehearing en banc was filed on July 14, 1988. Thereafter, the Ninth Circuit, by order dated

October 21, 1988, directed Appellant Barancik to file a supplemental petition for rehearing limited to the subject of the ripeness claims advanced on the appeal. On April 19, 1989, the Court of Appeals filed an Order and Amended Opinion. Subsequently, on June 6, 1989, the court denied Petitioner's petition for rehearing with suggestion for rehearing *en banc*. Judgment was entered on June 16, 1989. A motion to stay the mandate was granted by the Court of Appeals until July 21, 1989. A subsequent motion to extend the stay of the mandate was also granted, extending the stay until August 28, 1989. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns the application of the rules governing statute of limitations to claims brought under 42 U.S.C. § 1983 involving land use to redress the deprivations of rights, privileges and immunities secured by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment and Section 1983 of the United States Code, Title 42, are set forth in Appendix D to this petition.

STATEMENT OF THE CASE

Petitioner is the owner of a 561 acre parcel of land known as the Loma Alta Ranch in unincorporated Nicasio Valley, Marin County, California. In 1972, eight years before Petitioner purchased the ranch, the County changed the zoning on the property from 2 dwelling units per acre to 1 dwelling unit per 60 acres, thereby limiting the permitted density on the ranch to 9 residential units. A significant portion of the ranch falls within the County's City-Centered Corridor, a planning area designated for "urban development." Of the

five properties surrounding the Loma Alta Ranch, two were zoned for 50 dwelling units each and two were zoned for 22 units each. Only one property, a property subject to an agricultural contract, was zoned for 3 dwelling units. In January, 1980, Petitioner purchased the Loma Alta Ranch.

The Ranch—surrounded by property that has been zoned as intensively as 1 dwelling unit per 10 acres since 1972—is immediately across Lucas Valley Road from the "Skywalker Ranch," a movie studio operated by Film Director George Lucas. The Skywalker Ranch project includes a large number of dwelling units which are occupied by employees and visitors to the studio, and was approved by the Board of Supervisors of Marin County under the same procedures that were applied to Petitioner's application for development approval.

Development of the Loma Alta Ranch is governed by the Nicasio Valley Community Plan. The Plan identifies Petitioner's property as having marginal value for agricultural purposes, limited to grazing. Under the Plan, residential density was to be determined by the "bottom line" of the amount of water available on-site to serve residential units. In accordance with County procedures, Petitioner had a site analysis prepared for the ranch which revealed that the property contained water sufficient for 80 residential units, that there was little visibility of the site due to its "bowl" configuration and that the slopes were stable for residential construction.

In September, 1981, Petitioner submitted a master plan proposal accompanied by a request for a zoning amendment from A-RP 60 to A-RP 20, to permit 19 additional residential units on the 561 acre parcel, for a total of 28 units. The Planning Commission denied Petitioner's proposal and rezoning request. However, the Commission encouraged Petitioner to seek increased density through the use of his property as a "receiver site" for the Transfer of Development Rights ("TDR") under the County's Zoning Ordinance. Petitioner

withdrew his rezoning application and explored with County staff and elected officials the possibility of using TDR as a means to obtain increased density for Loma Alta. Over a two-year period, Petitioner met numerous times with the County and contacted other property owners in Nicasio Valley in an attempt both to develop a TDR program for the Loma Alta Ranch and to persuade the County to remedy what he believed, and the County later acknowledged, were serious defects in the existing TDR ordinance. When those efforts proved fruitless, Petitioner once again applied for the zoning amendment with his master plan proposal to permit the 28 clustered residential units. Petitioner submitted his application in September, 1983. In December, 1984, the Planning Commission again recommended denial of the proposal and rezoning request. In February, 1985, the Board of County Supervisors upheld the Planning Commission's denial of Petitioner's master plan proposal and rezoning request.

Subsequently, in June, 1985, Petitioner filed an action in the Federal District Court for the Northern District of California under 42 U.S.C. § 1983 challenging the County's agricultural preservation regulations on their face and raising other Constitutional claims, including the deprivation of his constitutional rights to substantive due process and to equal protection under the Fourteenth Amendment to the federal Constitution. In response to the County's motion to dismiss, the District Court ruled that Petitioner's facial challenge to the County's agricultural preservation regulations was barred by the statute of limitations. Later, in response to a motion for summary judgment, the District Court held that Petitioner's cause was premature and, in the alternative, granted summary judgment on the merits. Petitioner appealed to the Ninth Circuit Court of Appeals on the grounds that the District Court had abused its discretion by finding that Petitioner's case was premature and, in the alternative, dismissing the case on summary judgment grounds. The Ninth Circuit, in

an amended opinion, held that Petitioner's Complaint was, in fact, ripe for review but upheld the District Court's dismissal of Petitioner's substantive due process claim on summary judgment grounds. The court held further that Petitioner's facial challenge and "as applied" equal protection challenges were barred by Calfornia's one-year statute of limitations for Section 1983 claims, because the challenged zoning classification was adopted more than a year before Petitioner filed his complaint.

BASIS FOR FEDERAL JURISDICTION IN THE COURT BELOW

The complaint, *sub judice,* invoked the jurisdiction of the federal courts under the provisions of 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The decision of the Ninth Circuit Court of Appeals to impose California's one year statute of limitations for Section 1983 actions[1] to bar both Petitioner's facial challenge to Marin County's zoning regulations and his "as applied" equal protection claim is illogical and unjust. Petitioner respectfully submits that the Ninth Circuit's refusal to apply the "continuing wrong" doctrine ignores the fundamental character of zoning. In addition, the very act of rejecting an application for rezoning alone constitutes an act can only be understood as an official reaffirmation of the existing zoning, accruing a new and separate cause of action. The court's rule also denies

[1] In their briefs below, both parties agreed that the statute of limitations in this action brought under 42 U.S.C. 1983 is one year. Cal. Civ. Proc. Code 340(3). *Wilson v. Garcia,* 471 U.S. 261 (1985); *Gibson v. United States,* 781 F.2d 1334 (9th Cir. 1986).

to subsequent purchasers of property, *forever*, the right to challenge prior wrongful zoning of their property.

Finally, the application of the statute of limitations rule to zoning cases cannot be reconciled with this Court's doctrine of ripeness in land use cases—the doctrine which requires a landowner, before seeking judicial recourse, to pursue alternative development proposals with a local government until obtaining a final definitive decision on what intensity of use will be permitted on the property under the challenged zoning.

A.

THE NINTH CIRCUIT'S RULE FOREVER BARS A LANDOWNER FROM CHALLENGING WRONGFUL ZONING ADOPTED PRIOR TO THE PURCHASE OF PROPERTY

The unjust character and absurd consequences of the Ninth Circuit's decision *sub judice* are easily illustrated. If a California black person purchased a lot in a zoning district that explicitly excluded black persons from living in that district, the Ninth Circuit's rule would require that a facial challenge to the constitutionally repugnant exclusion be barred by the statute of limitations if the property had been zoned under the offensive zoning district classification more than one year prior to the initiation of the suit. The manifest unjustness of such a result is palpable. To permit a local government to enforce a patently discriminatory ordinance through the artifice of a limitations period would be judicial error, not only because it offends the sensibilities but also because the wrongful zoning is continuing—each day that the unconstitutional ordinance is law, the Constitution is violated.[2]

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[2] Correlatively it has been long established that every day a zoning ordinance is violated constitutes a separate violation. *See McQuillan, Municipal Corporations* §25.361 (3rd Ed.).

Long ago this Court recognized a landowner's right to challenge a zoning ordinance upon the grounds that the mere existence and maintenance of the ordinance may cause a present invasion of property rights as well as a continued threat to those property rights. *Village of Euclid, Ohio v. Ambler Realty Company*, 272 U.S. 365, 386-87 (1926). This reasoning is predicated upon the fundamental proposition that a federal court may be called upon to intervene when state or local laws violate basic property rights guaranteed by the United States Constitution. *See Terrace v. Thompson*, 263 U.S. 197 (1923).

If Petitioner's right to challenge the constitutional validity of a zoning classification on its face and as it applies to his property vis a vis surrounding properties is lost even before he purchases the property, local governments can act with impunity, knowing that an ordinance, however onerous, once adopted, will, in effect, become a regulation in perpetuity against all subsequent purchasers of property.[3]

There are strong policy justifications for statutes of limitation[4]; however, none of those policies are abridged by allowing a property owner to challenge the constitutionality of an ordinance that is applicable to his property where the ordinance was adopted prior to the period of limitations. Indeed, the public policy of limitations runs starkly in the other direction, namely, to reduce burdensome litigation levels. Thus, public policy does not favor litigation and, in

[3] The Ninth Circuit's rule also ignores the law of standing by placing a citizen in the position of having to challenge a legislatively enacted zoning classification of property before attaining a status, purchaser or otherwise, sufficient to have standing to bring such a challenge.

[4] They "serve to strike a balance between the need for certainty and predictability in legal relationships and the role of courts in resolving private disputes." *Allen v. United States*, 542 F.2d 176, 179 (3rd Cir. 1976). The policy of limitations also lies in avoiding the disruptive effect of unsettled claims. *See* Developments in the Law — Statutes of Limitations, 63 Harv. L.Rev. 1177, 1185 (1950).

particular, litigation that precedes the submission of issues to local processes. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986).

However, if the Ninth Circuit's opinion is allowed to become controlling law, then a property owner will have no choice but to initiate litigation every time a new land development regulation ordinance is adopted that raises the possibility of unconstitutionality; otherwise, a facial challenge and an "as applied" equal protection challenge brought after a development application has been considered and denied may be time barred. This fundamental conflict between the notion that an unconstitutional ordinance is immunized from challenge by the passage of the limitations period (compelling facial challenges or loss of constitutional rights), and this Court's view of the proper balance between judicial and nonjudicial fora in *Pennell v. City of San Jose*, ____ U.S. ____, 108 S.Ct. 849 (1988) compels correction by this Court.

B.

THE INJURY WHICH STARTS THE ACCRUAL OF A LANDOWNER'S CAUSE OF ACTION UNDER SECTION 1983 FOR WRONGFUL ZONING IS DELAYED UNTIL THE LANDOWNER SEEKS AND IS FORMALLY DENIED A REZONING

Petitioner brought his action under 42 U.S.C. § 1983 in 1985. He had purchased the Loma Alta Ranch, five years earlier, in 1980. According to the Ninth Circuit, however, Petitioner "brought his suit at least five years too late." App. B at p. B-8. Under federal law, the time of accrual of a cause of action under Section 1983 is when the plaintiff knows or has reason to know of the injury which is the basis of the action. *Lavelle v. Listi*, 611 F.2d 1129 (5th Cir. 1980); *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986); *Compton v. Ide*, 732 F.2d 1432 (9th Cir. 1984). The standard relates to this Court's analogy of Section 1983 claims to personal injury

claims for statute of limitations purposes. *Wilson v. Garcia*, 471 U.S. 261 (1985)

In a zoning context, however, the injury complained of is not analogous to the "single event" of an unlawful arrest, assault and battery and other tort analogies considered by the Court in *Wilson*. If, as Respondent successfully argued below, the single event from which the one year time period began was the County's adoption of the zoning ordinance in 1972 or, at the latest, 1979—still well before Petitioner purchased the property—he could not possibly have known or had reason to know of any injury. It defies logic and simple justice to suggest that the purchaser of property which suffers the ill effects of unconstitutional zoning enacted prior to his purchase can do nothing to rectify that wrong if it occurred over a year before his purchase.[5] The Ninth Circuit's rule means that even if an individual purchased property less than a year after a zoning enactment, he must rush to file a facial challenge to the zoning before even attempting to submit and obtain government approval of a development proposal under the ordinance. As noted above, such a rule, rather than limiting litigation, flies in the face of public policy by encouraging litigation at the outset. Worse still, as a practical matter, the Ninth Circuit's rule will result in the local government suspending its review and approval of a specific development proposal until the facial challenge is resolved.

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[5] The Ninth Circuit's time bar rule also conflicts with its pronouncement in *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986) in which it affirmed that the "[c]ourts have held consistently that a cause of action does not accrue until a party has a right to enforce the claim." Id. at 1146. citing *Baron v. Allied Artists Pictures Corp.*, 717 F.2d 105, 108 (3d Cir. 1983) and *United States Department of Labor v. Old Ben Coal Co.*, 676 F.2d 259, 261 (7th Cir. 1982). Until Petitioner had the right to enforce his claim, his cause of action could not accrue. That right became enforceable when the Marin County Board of Supervisors made its final decision regarding his property, in February, 1985.

The Ninth Circuit's failure to apply this distinction between a continuing *wrong* and a continuing *injury* in a zoning case has severe consequences for property owners' claims under 42 U.S.C. § 1983.[6]

C.

THE CONTINUING WRONG DOCTRINE APPLIES IN ZONING CASES

The "continuing wrong" doctrine applies "where a continuous chain of events or course of conduct is involved, in which case the cause of action accrues at the time of the final act in that series of events or course of conduct." *Barbaccia v. County of Santa Clara,* 451 F.Supp. 260, 266 (N.D. Cal. 1978); *Coleman v. Clark Oil & Refining Co.,* 568 F.Supp. 1035, 1040 (E.D. Wis. 1983).

1.

The Continuing Wrong Doctrine is an Equitable Doctrine

The continuing wrong doctrine is, at its foundation, a doctrine of equity. *New Port Largo, Inc. v. Monroe County,* 706 F.Supp. 1507, 1517 (S.D. Fla. 1988). The proper focus of the doctrine is the defendant's alleged wrongful activities, and not the plaintiff's suffering from those wrongful activities. *United States, Inc. v. Evans,* 431 U.S. 553, 558-59 (1977); *Altair Corp. v. Carmen Pesquera De Busquets,* 769 F.2d 30 (lst Cir. 1985); *Ward v. Caulk,* 650 F.2d 1144, 1147 (9th Cir. 1981). There, of course, can be single governmental acts in a zoning context, such as the taking of property through

[6] The Ninth Circuit has recognized this distinction only outside the land use context. *See Ward v. Caulk,* 650 F.2d 1144, 1147 (9th Cir. 1981).

regulation.[7] However, the federal courts outside the Ninth Circuit have recognized that there are instances where other government actions combine with the initial government zoning action to evoke the doctrine. *Ocean Acres Limited Partnership v. Dare County Board of Health*, 707 F.2d 103, 105-06 (4th Cir. 1983); *New Port Largo, Inc. v. Monroe County*, 706 F.Supp. 1507, 1517 (S.D. Fla. 1988). These courts and others have recognized that the doctrine's equitable principles are relevant to the complex factual scenarios which characterize land use disputes between landowners and local governments. See also *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978); *Jordan v. Rocco*, 648 F.Supp. 942 (N.D. Ohio 1986). The Ninth Circuit's opinion, however, is bereft of any analysis of the applicability of the continuing wrong doctrine to zoning cases, despite the fact that this issue was fully briefed by both sides.[8]

By refusing even to consider this doctrine in zoning cases, the Ninth Circuit has radically curtailed the potential scope of plaintiff landowners' claims under Section 1983—a substantial and unwarranted interference with Congress' intent to guarantee the effective enforcement of Constitutional rights through the Civil Rights Act of 1871.[9]

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[7] Petitioner's taking claim was formally abandoned on appeal to the Ninth Circuit and is not relevant to the issues raised in this Petition. See Appendix B at pp. B-7 and B-8.

[8] Indeed, it is indicative of the superficial level of analysis given to this question by the Ninth Circuit that court found that Petitioner's "as applied" equal protection claim was time-barred, while holding that the same statute of limitations did not bar his "as applied" substantive due process claim.

[9] See CONG. GLOBE, 42nd Cong., 1st Sess. at 334, 342, 368, 374, 428, 444, 457-59, 460, 476, 505-06, 653, App. 78, 167, 185, 24849, 252.

2.

Petitioner's Case Satisfies the Equitable Principles of the Continuing Wrong Doctrine

That the continuing wrong principle was applicable in Petitioner's case is evident when considered under the two prong test developed by the court in *Jordan v. Rocco*, 648 F. Supp. 942 (N.D. Ohio 1986). First, the plaintiff challenging the validity and constitutionality of an ordinance must be "diligent and vigilant in pursuing his or her remedies against the validity of the ordinance." *Id.* at 946. Second, the local government must continuously oppose the individual and enforce the ordinance. *Id.*

The record in this cause could not be clearer in revealing Petitioner's diligence in pursuing his remedies against the validity of the County's zoning ordinance on its face and as applied to his property. The record is equally clear in demonstrating that Marin County opposed Petitioner's challenge to its zoning every step of the way.

Following his purchase of the Loma Alta Ranch, in January, 1980, Petitioner had analyses performed on the ranch to determine its actual site characteristics in light of the governing planning policies of the Nicasio Valley Community Plan. Through his representatives, he informed the County that the results of those studies contradicted the County's prior conclusions regarding water availability, slopes, visibility and geology on the site—conclusions upon which the County had based its position that the 60 acre zoning was appropriate for the site.

In August, 1981, Petitioner submitted his development plan to the County, accompanied by a rezoning request which was justified on the basis of the applicable planning policies and the studies which demonstrated the suitability of his site for development. The County did not agree with Petitioner, and, in fact, required him to conduct a further study of the site at his own expense. That study did not contradict

Petitioner's findings. Based upon his belief in the correctness of his site analysis, Petitioner pursued his development plan first before County Planning Department, and then before the Planning Commission.

At each stage he challenged the validity of the 60-acre agricultural-residential zoning designation generally and as applied to his property. When the Planning Commission denied Petitioner's rezoning request in August, 1982, but suggested that he cooperate with the County in developing a transfer of development rights (TDR) program for the ranch under the County's zoning ordinance, Petitioner questioned the constitutionality of the County's TDR regulations as written. Nevertheless, he offered to work with the County to revise the regulations while also developing a TDR program for Loma Alta.

When more than two years of trying to work with the County in regard to TDRs proved fruitless, Petitioner resubmitted his original rezoning request for the same increased density. He pursued his administrative remedies, again challenging the validity of the A-RP-60 zoning on its face and as applied to his property before the Planning Commission. When the Commission again denied his request, in December, 1984, Petitioner appealed that decision to the Board of County Supervisors which, in February, 1985, upheld the Commission's decision. In sum, throughout the 5 year period from Petitioner's purchase of the ranch in 1980 until his commencement of this lawsuit in 1985, Petitioner and the Respondent were locked in a continuing controversy over the validity of the County's zoning.

Petitioner respectfully submits that the continuing wrong doctrine applies in this case. Under that doctrine, the accrual of Petitioner's cause of action is delayed and only accrues at the time of the final act in the series of events or course of conduct, namely, the Board of County Commissioner's final decision to reject Petitioner's development proposal in

February, 1985. See *United States v. Dickinson*, 331 U.S. 745, 748-49 (1947).

D.

THE NINTH CIRCUIT'S STATUTE OF LIMITATIONS RULE IS ADVERSE TO THIS COURT'S RIPENESS DOCTRINE IN LAND USE CASES

In a series of decisions since 1978,[10] this Court has established the central importance of the ripeness doctrine in land use cases. In essence, the Court has instructed landowners who contemplate challenging land use restrictions in federal court that, without first submitting at least one meaningful application and obtaining a final decision regarding that application, all substantive due process, equal protection and taking claims will be dismissed as premature. In order to satisfy this "finality" requirement, this Court has also insisted that potential plaintiff property owners pursue all avenues of administrative relief before coming to court. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson Co. Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

As a category of justiciability, the ripeness doctrine serves the sound purpose of ensuring that a dispute has matured sufficiently to satisfy the "case or controversy" mandate of article III of the Constitution. However, that purpose is undermined by a statute of limitations rule that bears no relation to the practical time realities of the development approval process which this Court sought to address through the ripeness doctrine. The development approval processes

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[10] *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson Co. Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *Agins v. City of Tiburon*, 447 U.S. 225 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

and accompanying time periods necessary to secure a final decision and any needed administrative relief from local government typically extend well beyond a year from the property owner's date of purchase. The Ninth Circuit's statute of limitations rule subverts the article III concerns of the ripeness doctrine and places a plaintiff property owner in jeopardy.

The new landowner, who risks having his challenge to the prior zoning of his property held time barred if he takes more than a year to seek the final decision required by the ripeness doctrine, must choose between two futile alternatives: (1) Sue immediately and be dismissed for lack of ripeness[11] or (2) Wait until a final decision is obtained and then sue, knowing that certain of his constitutional claims will be time barred. Surely this Court did not intend that the applicable statute of limitations for Section 1983 actions should be used to deprive plaintiffs of some or all of their constitutional claims after those same plaintiffs have sought, in good faith, to satisfy the requirements of the ripeness doctrine. Simple justice demands that the time delays necessary to satisfy this ripeness doctrine be tempered by the equitable principles of the continuing wrong doctrine.

[11] Although a plaintiff property owner could limit his challenge to a facial attack and thereby avoid the ripeness doctrine (an "uphill struggle"), *see Keystone Bituminous Coal Assn. v. DeBenedictus*, 480 U.S. 470 (1987), a statute of limitations rule that encourages such bifurcated litigation is certainly contrary to the judicial policy underlying the ripeness doctrine.

CONCLUSION

The Ninth Circuit's decision below to time bar all but one of Petitioner's constitutional claims weighs heavily and unjustly upon all property owners who seek redress for deprivations of their constitutional rights under 42 U.S.C. § 1983. The court's blanket statute of limitations rule denies to subsequent purchasers of property, *forever*, the right to challenge wrongful zoning of their property. No other Circuit of this nation has applied the statute of limitations rule for Section 1983 actions so as to exclude property owners' constitutional claims from the federal forum contemplated by Congress in adopting the Civil Rights Act of 1871. Petitioner respectfully submits that the fundamental constitutional rights at stake in the Ninth Circuit's decision and the serious conflict of that decision with this Court's ripeness doctrine compel review by this Court.

For all of the foregoing reasons Petitioner respectfully prays that this Honorable Court grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision in this case.

Respectfully submitted,

CHARLES L. SIEMON
BRIAN W. BLAESSER
SIEMON, LARSEN & PURDY
Dearborn Station
47 W. Polk Street
Chicago, Illinois 60605
312/939-7117

APPENDICES

APPENDIX A

Order of Ninth Circuit Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD M. BARANCIK,
Plaintiff-Appellant,
vs.
COUNTY OF MARIN,
Defendant-Appellee.

No. 87-1982
DC# CV 85-3848-TEH
ORDER

Before: SCHROEDER, NOONAN and O'SCANNLAIN, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX B

Ninth Circuit Order and Amended Opinion

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD M. BARANCIK,
Plaintiff-Appellant,

v.

COUNTY OF MARIN AND AL ARAMBURU; GARY GIACOMINI, HAROLD BROWN, ROBERT STOCKWELL, ROBERT ROUMIGUIERE, individually and as members of the Marin County Board of Supervisors,
Defendants-Appellees.

No. 87-1982

D.C. No. CV-85-3848-TEH

ORDER AND AMENDED OPINION WITH SPECIAL CONCURRENCE

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted
May 12, 1988—San Francisco, California

Filed June 30, 1988
Order and Amended Opinion Filed April 19, 1989
Special Concurrence Filed April 19, 1989

Before: Mary M. Schroeder, John T. Noonan, Jr. and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Noonan; Special Concurrence by Judge Schroeder

SUMMARY

Land Use and Zoning/Real Property/Constitutional Law

The court held that a zoning regulation restricting development and the transfer and accumulation of development rights sustain constitutional attack.

Loma Alta Ranch lies in Nicasio Valley, Marin County. In 1973 Marin County adopted its Countywide Plan recommending zoning to a density of one residence per 60 acres. In 1979 the Marin County Board of Supervisors approved the Community Plan that was consistent with the Countywide Plan. In 1981 The County Board of Supervisors adopted Transfer of Development Rights amendments to the Countywide Plan and the Community Plan. It permitted ranchers to sell to other property owners in the valley the right to develop within the regulations of the community. A purchaser could accumulate more than one development right. Appellant Richard Barancik bought Loma Alta in 1980. According to the zoning Barancik could only build nine residences on the property. The Planning Commission denied his request to build more units. The Marin County Board of Supervisors affirmed.

[1] Barancik's facial challenge is barred by the statute of limitations. [2] His objection to Lucas's preferential treatment, involving an amendment to the County Code, is barred by the statute of limitations. [3] The County had a reasonable purpose in zoning as it did and applying the zoning as it did to Loma Alta Ranch. The choice was not irrational, the application to Barancik not arbitrary. [4] The regulation permitting the accumulation of transfer rights is rationally related to the overall purpose of preserving agriculture in the area.

COUNSEL

Brian W. Blaesser, Siemon, Larsen, Mattlin & Purdy, Chicago, Illinois, for the plaintiff-appellant.

Douglas J. Maloney, County Counsel, and Robert H. San Chez, Deputy County Counsel, San Rafael, California, for the defendants-appellees.

ORDER

The slip opinion is amended as follows:

Page 7845: Strike the first paragraph and substitute the following:

> Richard M. Barancik, owner of Loma Alta Ranch, challenged the zoning plan of Marin County as it applied to the ranch and on its face. The district court dismissed the facial challenge as barred by the statute of limitations. On summary judgment, the district court found the challenge not ripe for review and alternatively granted judgment for the County on the merits. Barancik appeals.

Pages 7848-7849: Strike paragraphs 1, 2, and 3. Substitute the following:

1. *Ripeness for Review*

Barancik's petition is ripe for review. *Hoene v. County of San Benito* (Slip Opinion March 15, 1989). The record does not indicate that a variance procedure was available. "Indeed, the County has at no time asserted that application for a variance was a viable option." *Herrington v. County of Sonoma* 857 F.2d 567 (9th Cir. 1988), as amended September 13, 1988. There is no requirement that he make a futile reapplication.

2. *The Facial Challenge*

As the district court held in dismissing one count, Barancik's facial challenge is barred by the statute of limitations. The cause of action accrued either in 1972 or 1975 or, at the latest, 1979. Barancik filed his suit on June 14, 1985. *Wilson v. Garcia*, 471 U.S. 260 (1985) was decided on April 17, 1985. Accordingly, the governing statute of limitations was a one-year statute. *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986). Barancik brought his suit at least five years too late.

3. *Equal Protection*

The zoning of the adjoining properties was done in 1972. Objection to this zoning is again barred by the applicable statute of limitations.

Barancik — pretty much by innuendo — suggests that George Lucas's Bulltail Ranch is being treated differently because of Lucas' fame as a filmmaker. The amendment of the Marin County Code that permits "limited commercial use" in agricultural zones was adopted in 1979. Again, the statute of limitations is a bar.

OPINION

NOONAN, Circuit Judge:

Richard M. Barancik, owner of Loma Alta Ranch, challenged the zoning plan of Marin County as it applied to the ranch and on its face. The district court dismissed the facial challenge as barred by the statute of limitations. On summary judgment, the district court found the challenge not ripe for review and alternatively granted judgment for the County on the merits. Barancik appeals.

FACTS

Loma Alta Ranch consists of 561 acres of a westerly-facing basin in Nicasio Valley, Marin County. The bowl is bounded on the north, east and south by a continuous ridge dominated by Loma Alta Peak. The property consists of a series of branching canyons with moderately to steeply sloping sides covered with grass. Loma Alta Peak, with an elevation of 1,589 feet is one of the highest peaks in the county; the ridge line of the ranch is visible from a variety of angles within the county. The ranch is now used for grazing for about 40 head of cattle.

In 1973 Marin County adopted its Countywide Plan rezoning properties in Central and Western Marin for conservation or agricultural uses. The Plan recommended zoning to a density of one residence per 60 acres in the area of Marin designated for agricultural use. The aim was to assure Marin ranchers that their operations would be protected from residential development incompatible with agriculture.

In 1976 the Cold Creek Land and Cattle Corporation proposed to divide the Loma Alta Ranch into four 140 acre lots. The proposal was denied by the Planning Commission of the County on the grounds that the geologically stable areas were along the ridge lines but development along the ridge lines was not in conformity with the Marin Countywide Plan; that the availability of water, of sewage and of fire protection was questionable; and that a three mile road would be required to provide access and the road would increase potential for landslides, erosion and sedimentation.

In 1979 the Marin County Board of Supervisors approved the Nicasio Valley Community Plan. The Plan was specific to Nicasio Valley and consistent with the Countywide Plan. The Plan celebrated Nicasio Valley as "a jewel" in California's "beautiful rural landscape." The Plan noted "the slow but pressing expansion of urban land uses" as affluent persons

sought to buy residences in the valley. The Plan reaffirmed the valley's commitment to agriculture and to "the open spacious feeling of Western Marin." The Plan recommended that Loma Alta Ranch be rezoned to permit residential use but at a density of no more than one residence per 60 acres. The recommendation was adopted in 1979.

In 1981 The County Board of Supervisors adopted amendments to the Countywide Plan and the Nicasio Valley Community Plan. The amendments were entitled "Transfer of Development Rights." Directed specifically to the homogeneous community of Nicasio Valley, the amendments treated the valley "as one complete land forum, one large property to be sensitively planned." The amendments permitted ranchers in the valley to sell to other property owners in the valley the right to develop within the regulations of the community. A purchaser could accumulate more than one development right.

Barancik had bought Loma Alta in 1980. He had then engaged in discussion with the County and explored various possibilities for the development of the ranch. As an agricultural project the ranch cost as much or more in taxes as it produced in revenue. According to the zoning Barancik could only build nine residences on the property. Barancik proposed a plan by which 28 residences would be built, clustered so that as much grazing of cattle could go on as presently. The Planning Commission of the County indicated that the plan might receive approval if Barancik could acquire "Transfer Development Rights" from other ranchers. But, according to his complaint, Barancik wanted to pay no more than $8,000 a right while $30,000 was what at least one rancher sought to get. The result was that Barancik acquired no Transfer Development Rights.

On September 12, 1983 Barancik filed a formal application for rezoning of the Loma Alta Ranch to permit him to build 28 residential units. On December 3, 1984 the Planning

Commission denied his request. On appeal to the Marin County Board of Supervisors, the Board on February 5, 1985 affirmed the denial. The county supervisors found that approval would "encourage premature subdivision of agricultural lands by giving the expectation that agricultural land can be converted to residential use at a higher density than existing zoning." They also found that increasing the density by 300 percent "would significantly increase the potential conflicts between residential and agricultural uses on the site and at adjacent properties." They further found that approval "would create uncertainty in the agricultural community as to the intent of the County" and that this uncertainty would lead farmers "to refrain from making investment necessary to improve their agricultural operations." This lawsuit followed.

ISSUES

By his amended complaint Barancik alleged that the denial of his rezoning application "constituted an unreasonable application" of the Countywide Plan and was "therefore without substantial relationship to the public, [sic] health, safety and welfare." This allegation is the only allegation in the complaint which could be construed to raise the issue of denial of due process under the Fourteenth Amendment. It was so construed by the district court. We accept this construction for purposes of this appeal.

The district court dismissed with prejudice a count in the unamended complaint which alleged that the regulations on their face are invalid. The complaint also alleged that the zoning as applied violated Barancik's right "to equal protection under the Fourteenth Amendment to the United States."

Finally, the complaint alleged that the zoning had deprived Barancik "of all beneficial use of his property in violation of the Fifth and Fourteenth Amendments." This last issue, which loomed large in the district court, was formally abandoned on appeal at the oral argument of the case. Conse-

quently there remain only the due process and equal protection claims.

ANALYSIS

1. *Ripeness for Review.*

Barancik's petition is ripe for review. *Hoene v. County of San Benito* (Slip Opinion March 15, 1989). The record does not indicate that a variance procedure was available. "Indeed, the County has at no time asserted that application for a variance was a viable option." *Herrington v. County of Sonoma* 857 F.2d 567 (9th Cir. 1988), as amended September 13, 1988. There is no requirement that he make a futile reapplication.

2. *The Facial Challenge*

[1] As the district court held in dismissing one count, Barancik's facial challenge is barred by the statute of limitations. The cause of action accrued either in 1972 or 1975 or, at the latest, 1979. Barancik filed his suit on June 14, 1985. *Wilson v. Garcia,* 471 U.S. 260 (1985) was decided on April 17, 1985. Accordingly, the governing statute of limitations was a one-year statute. *Gibson v. United States,* 781 F.2d 1334 (9th Cir. 1986). Barancik brought his suit at least five years too late.

3. *Equal Protection.*

> [2] The zoning of the adjoining properties was done in 1972. Objection to this zoning is again barred by the applicable statute of limitations.

4. *Substantive Due Process.*

[3] The district court found that the County had a reasonable purpose in zoning as it did and applying the zoning as it

did to Loma Alta Ranch. We agree. To prove his case Barancik had to show that the County's zoning was arbitrary and irrational. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1975). He attempted to do so by concentrating on the zoning in relation to his own property and arguing that just as many cows would graze there if there were 28 residences as would if there were nine. The argument, of course, is myopic. Zoning is of an area. The planner wants to preserve an area for a given use. Yielding to Barancik's arguments would set a precedent which, followed, would lead to the cumulative destruction of agriculture in Nicasio Valley. The cowboy and the farmer may be friends as the song has it, but not the rancher and the urban commuter, at least not if commuters, with the roads they need and the cars they drive and the tastes they have, begin to predominate in the countryside. Marin's zoning no doubt preserves a bucolic atmosphere for the benefit of a portion of the population at the expense of those who would flow into the county if there was no zoning. The Constitution lets that decision be made by the legislature. The Countywide Plan is a legislative declaration that there will be a corridor in Marin agricultural in its use. The choice was not irrational, the application to Barancik not arbitrary.

Barancik suggests that at least by analogy the dictum of the Supreme Court in *Nollan v. California Coastal Commission*, 107 S.Ct. 3141 at 3148 (1987) has application. The Court pointed out that while California could prohibit shouting "FIRE" in a crowded theater, it could not make such a prohibition and then give dispensations to shout to those willing to contribute $100 to the state treasury. Why, it is asked, is the County's scheme for Transfer Development Rights different? You can get your development if you are willing to pay a price for it. The answer is that you are not being given a dispensation from zoning by payment of a fee to the state. You are being permitted to accumulate development rights in the same area by a price paid to the owner of the rights.

[4] In other words, a finite amount of development is permitted in the area. The County is rightly indifferent as to who

does the development. It lets the market decide the price. A purchase of Transfer Development Rights does not increase the total amount of development possible in the rural corridor. The regulation permitting the accumulation of transfer rights is rationally related to the overall purpose of preserving agriculture in the area.

AFFIRMED.

SCHROEDER, Concurring Specially:

I concur in the result. The district court properly dismissed appellant's action. On the basis of the undisputed facts in the record, appellant could not prevail on any of his challenges to the county's original zoning, or to the county's rejection of plaintiff's request to treble the density permitted under that zoning.

APPENDIX C

Opinion and Order of the U.S. District Court for the Northern District of California

C-1

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD M. BARANCIK
Plaintiff,

vs.

COUNTY OF MARIN, a Subdivision of the State of California,
Defendant.

NO. C 85-3848-TEH

ORDER

This matter comes before the Court on the issue of whether this action at present is ripe for adjudication and on defendant's motion for summary judgment on the substantive merits of the case. After careful consideration of the record and the papers submitted in this matter, the Court hereby finds that this action at present is not ripe for adjudication and in the alternative grants defendant's motion for summary judgment.

On January 16, 1980, plaintiff Richard Barancik purchased a 561-acre plot of land in Marin County, California, known as Loma Alta. Much of the land in rural Marin County is used for agricultural purposes. Preservation of agricultural lands has become an important goal of Marin County planning and zoning efforts over the last two decades. Since late 1972, seven years before plaintiff purchased the property, Loma Alta has been zoned for agricultural uses with low residential density, ARP-60 (agriculture, one unit per 60 acres). Prior to purchasing the property, plaintiff discussed the property with realtors who were familiar with Marin County's agricultural preservation policies and its use of ARP-60 zoning. When plaintiff bought the property he was fully aware of the strictly enforced ARP-60 zoning, that would permit at most nine residential units on Loma Alta. Despite this knowledge, plaintiff purchased Loma Alta and pursued

an aggressive effort to get the County to triple the residential density permitted on the property in the face of repeated warnings from County officials that the County would not break its agricultural zoning for Loma Alta. The County refused to increase the density and denied plaintiff's rezoning, community plan amendment, and Master plan applications for the property. Consequently, on June 14, 1985, plaintiff brought this action against defendant County of Marin, claiming that the County's refusal to approve his applications to change the zoning for Loma Alta violated his constitutional rights. Specifically, plaintiff alleges that the County's actions constitute a taking under the Just Compensation Clause of the Fifth Amendment, a violation of equal protection under the Fourteenth Amendment, and a deprivation of property without due process under the Fourteenth Amendment.

Before addressing the substantive merits of this action, this Court must examine whether this action at present is ripe for adjudication. Defendant contends that plaintiff's claim is premature at present because of the absence of a final, definitive statement from the County on the nature of development that would be permitted on Loma Alta. On November 22, 1985, this Court denied the County's motion for abstention and found that the County's actions were sufficiently final such that this matter is properly before this Court. Subsequent to this Court's November 22, 1985 order, the United States Supreme Court decided *MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561 (1986), which pertains directly to the finality issue before this Court. Consequently, reconsideration of this Court's November 22, 1985 order is warranted in light of *MacDonald*.

After careful consideration of the record, the Court finds that defendant's actions were not sufficiently final such that plaintiff's claims are premature. Under *MacDonald*, a property owner may not bring an action claiming a regulatory taking until the governmental body has made a final decision regarding the precise nature and extent of development it

will allow on the property. "It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald*, 106 S.Ct. at 2566. A court cannot determine whether a regulation is a taking unless it has information about exactly how far the regulation goes. Neither can a court determine if compensation is "just" unless it knows what compensation, if any, the governmental body intends to provide. *Id.* at 2566-67. "Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *Id.* at 2569 n. 9. In *MacDonald*, the Supreme Court held that plaintiff's taking claim was premature because the county's denial of one proposal did not constitute a final decision that indicated adequately how the county would treat proposals for lesser but still valuable levels of development. *Id.* at 2566-69.

Plaintiff in the present case has failed to obtain a final decision as to the type and intensity of development permitted on Loma Alta. Plaintiff has submitted proposals for development of 28 residential units on the property. However, the county's denial of these proposals does not imply that [sic] "nine units plus grazing" that the County clearly will permit on the property is a final decision on the nature and extent of development permitted on Loma Alta. The fact that the County has rejected a proposal involving 28 residential units does not imply that it would reject development proposals that involved non-residential uses or a mix of residential and non-residential uses. There are numerous alternative uses for Loma Alta that plaintiff has not fully explored and about which defendant has not made a final decision. Permitted uses which require no use permit include, *inter alia*, dairying, grazing, raising and keeping various animals, leasing for hunting, and farming crops, vine, or trees. Uses that require a use permit include, *inter alia*, timber harvesting, ranching,

operating animal hospitals and kennels, maintaining commercial storage, and selling garden supply products. In addition, plaintiff submitted a proposal to the County for a conference center, upon which the County has not made a final decision, because of plaintiff's pursuit of the residential development proposal. Neither has plaintiff fully pursued alternatives involving possible transfer of development rights. Finally, the Court rejects plaintiff's argument that the decision of the County is final because all alternative uses for the site would not be "economically viable." The very purpose of the finality doctrine is to avoid unwarranted speculation about what uses and levels of economic return a piece of property may have and to inquire into investment-backed expectations and economic viability only after the decision of the governmental body is final. *See MacDonald*, 106 S.Ct. at 2566.

The fact that the decision of the County is not final renders all three of plaintiff's claims premature. Both *MacDonald* and *Williamson Co. Regional Planning v. Hamilton Bank*, 105 S.Ct. 3108 (1985), held that the absence of a final decision made plaintiff's takings claim premature. However, the finality doctrine is not limited to takings claims. The Supreme Court in *MacDonald* employed broad language when it stated that "[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald*, 106 S.Ct. at 2567. The Court in *Williamson* specifically stated that lack of a final decision rendered a due process claim premature just as it did a takings claim. The *Williamson* Court reasoned that the same analysis applied to both takings and due process claims in that the Court could not determine whether a governmental body's action went "too far" so as to violate due process unless it knew "how far" it went. The Court stated that these issues could not be resolved until there was a final decision regarding how the regulations would be applied to the plaintiff's property. *Williamson*, 105 S.Ct. at 3123-24. The Court

concluded that "respondent's claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." *Id.* at 3124. Although neither *MacDonald* nor *Williamson* addresses an equal protection claim, the same rationale pertaining to takings and due process claims would apply. The Court cannot determine whether a local government's actions violate a person's rights to equal protection of the law until the actions of the governmental body constitute a final decision.

We now turn to defendant's motion for summary judgment. Defendant moves for summary judgment with respect to plaintiff's takings, equal protection, and due process claims. After careful review of the record, this Court finds that granting summary judgment in favor of defendants with respect to all three of plaintiff's claims would be proper if the claims at present were ripe for adjudication.

We turn first to plaintiff's takings claim. The fifth amendment to the United States Constitution guarantees that private property shall not "be taken for public use, without just compensation." In determining whether a regulation is an unconstitutional taking, a court in each case should engage in "essentially ad hoc, factual inquiries" that consider several factors. The United States Supreme Court has identified three factors of particular significance: the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action. *MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561, 2566 (1986) (and cases cited therein). With respect to zoning ordinances, the Supreme Court has held that application of a zoning ordinance effects a taking if the ordinance does not "substantially advance legitimate state interests" or denies the owner "economically viable" use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citations omitted).

The economic factors are of particular importance to the present case. First, a "reasonable investment-backed expectation" must be more than a " 'unilateral expectation or an abstract need' " *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984), *quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). A property owner cannot have a reasonable expectation that the governmental body will permit development that is inconsistent with then current zoning and planning law.[1] In *Ruckelshaus*, the Supreme Court held that Monsanto could have no reasonable investment-backed expectation that the Environmental Protection Agency would act in a manner beyond the limits that the law prescribed. *Id.* at 1006. *Ruckelshaus* has been applied to zoning cases. In *Furey v. City of Sacramento*, 592 F.Supp. 463, 470 (E.D. Cal. 1984), *aff'd* 780 F.2d 1448 (9th Cir. 1986), the court, citing *Ruckelshaus* stated that for a expectation to be reasonable it had to be "at least consistent with the law in force at the time of the formation of the expectation." *Id.* at 470. The court in *Furey* went on to state that consistency with the general plans was not sufficient to render a property owner's expectations reasonable and that a property owner had no vested right in any particular zoning classification. *Id.* at 470. *See also MacLeod*, 749 F.2d at 549 (denial of permit to harvest timber does not violate reasonable

[1] Plaintiff's reliance on *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993 (1st Cir. 1983) is inapposite. *Urbanizadora* does not support plaintiff's contention that this Court may find a taking even though plaintiff acquired the property after the disputed regulation was in place. *Urbanizadora* concerned unconstitutional precondemnation activity whereas the present case involves a regulatory taking. In the present case, plaintiff is challenging the regulatory action itself that occurred before his purchase of the property. However, in *Urbanizadora*, plaintiff was not challenging the regulatory action itself which occurred before the purchase of the property, that is the government's announcing its intent to condemn the property. Rather, plaintiff was challenging the government's *delay* in implementing the regulatory action which delay essentially occurred after purchase of tne property.

investment backed expectation, where harvesting timber was merely an additional expected use of property).

Second, the economic impact of the regulation is closely related to the issue of whether the regulation denies an owner "economically viable" use of her land. A taking occurs only when the governmental action deprives the property owner of virtually all reasonable use of her property. A property owner is not denied an economically viable use of her land merely because she is deprived of the highest and best use of the land. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130 (1978). Nor does a regulation's causing substantial diminution in the value of the land mean that the regulation has denied the owner economically viable use of the land. *Id.* at 131. A property owner does not have a constitutional right to recover his investment or even a reasonable return on his investment. *William C. Haas v. City and County of San Francisco*, 605 F.2d 1117, 1120-21 (9th Cir. 1979). The regulation need not allow the owner to use the property in a "profitable" manner but only permit the property to be sufficiently desirable such that the owner is able to sell the property to someone for its use. *Park Avenue Tower Associates v. City of New York*, 746 F.2d 135, 139 (2d Cir. 1984) *See also MacLeod* 549 F.2d 541, 544 (9th Cir. 1984).

The undisputed facts establish that there was no taking in the present case. Plaintiff has not been deprived of his reasonable investment-backed expectations. When plaintiff purchased the property he knew it was zoned ARP-60, as it had been for seven years. Since plaintiff purchased the property, defendant has neither changed the zoning of the property nor imposed any restrictions on development other than those already in place at the time of the purchase. Plaintiff either knew or should have known that protection of agricultural lands was one of defendant's highest planning and zoning priorities. Plaintiff's mere hope that defendant

would change the zoning for Loma Alta cannot constitute a "reasonable investment-backed expectation."

Likewise, the undisputed facts show that plaintiff has not been deprived of all economically viable uses of his property. First, the land could remain in agricultural use with a positive cash flow if it were put under agricultural contract pursuant to the Williamson Act, California Government Code §§ 51200-51298. Even if maintaining the property as a cattle grazing operation resulted in a small operating loss of the property and development of only nine units on the property would not even yield a positive cash flow, plaintiff still has not been denied all economically viable use of his property. There is no taking as long as some value remains in the property. In *MacLeod*, the fact that the property retained value as an investment meant that no taking had occurred. *MacLeod*, 749 F.2d at 547-48. The undisputed facts show that the continuing market for agricultural land in Marin county enables plaintiff to sell Loma Alta at a price equal to or even greater than what he paid for it. It is without question that Loma Alta retains value.

Second, we examine plaintiff's equal protection claim. Granting summary judgment in favor of defendant on this claim is also proper. In evaluating plaintiff's claim, this Court should apply the rational relation test. This Court must uphold the validity of defendant's application of the zoning ordinance if defendant's actions are "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249, 3254 (1985). A law does not violate equal protection merely because it is "unwise or unartfully drawn." *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175 (1980). It must be a "wholly arbitrary act" or "invidious discrimination." *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976). This Court may not inquire whether the government's action in fact accomplishes its purpose. The Court's inquiry is merely whether the government "could rationally have decided" that the zoning would

serve this purpose. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981). "Thus, absent defects in the process of enacting the legislation, or manifest irrationality in the results flowing from that process, courts will uphold state and local land use regulations against challenges based on federal constitutional grounds." *Rogin v. Bensalem Township*, 616 F.2d 680, 698 (3d Cir. 1980).

The undisputed facts show that defendant's decisions with respect to the zoning of Loma Alta were rationally related to a legitimate governmental interest. The facts show that on no occasions did defendant grant rezoning requests to other similarly situated property owners but deny plaintiff's request. The facts are undisputed that there was a rational basis for its decision that denying plaintiff's rezoning application would further defendant's agricultural preservation policies. Although defendant's zoning of agricultural parcels in the County may not be absolutely perfectly tuned to the idiosyncrasies of every individual parcel, it is clearly a rational, systematic scheme to further the agricultural preservation policies.

Third, we turn to plaintiff's substantive due process claim. Granting defendant's summary judgment on this claim is also proper. The standard this Court must apply to plaintiff's due process claim is similar to the standard for the equal protection claim. Governmental action does not violate substantive due process if the government's decision is "rationally related" to a "legitimate" government interest. *Rogin v. Bensalem Township*, 616 F.2d 680, 689 (3d Cir. 1980). This Court must give great deference to a local government decision's with respect to zoning. "Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation." *Construction Industry Ass'n, Sonoma County v. City of Petaluma*, 522 F.2d 897, 906 (9th Cir. 1975).

There is no question that defendant's denial of plaintiff's rezoning request was rationally related to the governmental interest in preserving agricultural land. Despite possible dispute over defendant's treatment of issues such as visibility of building sites on Loma Alta, marginal agricultural land of Loma Alta, and water availability, there is no question that the County's denying plaintiff's rezoning request was rationally related to a legitimate governmental interest. There is a rational basis for finding that defendant's denying plaintiff's rezoning request was consistent with the relevant local plans. California Government Code § 65860 requires that all county zoning ordinances be consistent with a county's general plan. In addition, a general plan must be internally consistent. Cal. Gov't Code § 65300.5. Marin County's general plan consists of the Countywide Plan and various community plans. Zoning ordinances relating to property in the Nicasio Valley must be consistent with both the Countywide Plan and the Nicasio Valley Community Plan, not merely the Nicasio Valley Community Plan, as plaintiff contends. The undisputed facts establish that the County's actions were consistent with the county's general plan.

Accordingly, good cause appearing, IT IS HEREBY ORDERED that plaintiff's complaint is dismissed because his claims are premature. In the alternative, defendant's motion for summary judgment with respect to all of plaintiff's claims is granted. IT IS FURTHER ORDERED that plaintiff's motion to strike defendant's reply memorandum in support of motion for summary judgment is denied.

IT IS SO ORDERED.

DATED: March 24, 1987

/s/

THELTON E. HENDERSON
United States District Judge

APPENDIX D

(1)
Constitutional Provisions

(2)
Statutes

AMENDMENT XIV

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE CIVIL RIGHTS ACT OF 1871

Section 1983 of the United States Code, Title 42, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2)

89-318

Supreme Court, U.S.
FILED
SEP 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

RICHARD M. BARANCIK,
Petitioner,

v.

COUNTY OF MARIN, CALIFORNIA,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DOUGLAS J. MALONEY,
County Counsel*
ROBERT H. SAN CHEZ,
Senior Deputy
Suite 342, Civic Center
San Rafael, California 94903
(415) 499-6128
Attorneys for Respondent County of Marin

* Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

22 P

QUESTION PRESENTED

The following additional question is presented:

Should the United States Supreme Court grant Certiorari to decide a question which will have absolutely no effect on the outcome of this litigation?

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No. 89-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

RICHARD M. BARANCIK,
Petitioner,

v.

COUNTY OF MARIN, CALIFORNIA,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner instituted an action in the Federal District Court "For Damages and Declaratory Relief Under the Constitution of the United States and Federal Civil Rights Act" because Respondent denied his application to upzone his property to three times the designated residential density.

The District Court granted the Respondent's motion for summary judgment in an unpublished decision (Appendix C to Petition for Certiorari). The Ninth Circuit affirmed the decision of the District Court in an opinion reported at 872 F.2d 834 (Appendix B to Petition). It denied a Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix A to Petition).

It is impossible to improve on the cogent statement of facts contained in the Circuit Court's opinion commencing at 872 F.2d 835. However, inasmuch as Petitioner's recitation of facts is misleading and inaccurate in a number of particulars, the following information may be of assistance.

1. The Property

Petitioner's ranch is in a predominantly agricultural area with access via a winding, steep, narrow, unpaved fire road through an adjacent ranch, over 6000 feet from the nearest County road.[1] (CR 3:Ex.G:6; CR 103:Ex.14) The 561 acre property consists of a steeply sloping basin bounded on three sides by a ridge dominated by Loma Alta Peak, one of the County's highest, most visual and scenic peaks, after which the Ranch is named. (CR 3:Ex.G:6; CR 103:Ex.14.) There are no residences or other buildings on the property which has been used for cattle grazing for over 100 years. (CR 3:Ex.G:7.)

2. The 1972 Agricultural Zoning and 1973 General Plan

In 1972, the County rezoned most of the land in this area, including Loma Alta Ranch, to A-60, (Agricultural, one residential unit per 60 acres) without complaint from the owner. (Ordinance 1939, County Addendum 2; CR 103:Ex.8; CR 109: Para. 15; CR 166:2.)

The Marin Countywide plan or general plan was adopted in 1973. It divides the County into three environmental corridors. The eastern portion is designated the "City-Centered Corridor," the central portion is designated the "Inland Rural Corridor," and the Coastal areas are designated as the "Coastal Recreation Corridor." (CR 3:Ex.C:2-1; CR 107:Ex.A.) The Countywide Plan concentrates urban development in the City-Centered Corri-

---

[1] This remote location is characterized by Petitioner as "immediately across Lucas Valley Road from the 'Skywalker Ranch.' " In fact, Loma Alta Ranch is actually two miles down the road and more than a mile inland from the Skywalker Ranch (CR 109: Para. 20). Moreover, the Skywalker property is not, as Petitioner claims, a "movie studio" and most certainly does not contain "a large number of dwelling units." (Petition, p. 3).

dor "so that the rest of the County can remain as open as possible." (CR 3:Ex.C:2-1 through 2-3, 5-28.) The Plan also endeavors to preserve agriculture and discourages premature subdivision and conversion of vital agricultural lands in the inland rural corridor which contains Petitioner's ranch. (CR 3:Ex.C:2-11; CR 166:1).

3. The 1979 Local Plan and Rezoning

The Nicasio Valley Community Plan (hererafter "NVCP") was adopted in 1979 as part of the County's general plan and includes the area in which Petitioner's Loma Alta Ranch is located. (CR 3:Ex.D; CR 103:Ex.2.3.) One of the fundamental goals of the NVCP is:

> "To encourage the preservation of agricultural land and activities; preserving the best agricultural land in the Valley in parcels large enough to permit the continuation of existing and the possibility of future agricultural activities." (CR 3:Ex.D:5.)

The NVCP specifically addresses Petitioner's Loma Alta Ranch and the four other large properties in the vicinity. (County Addendum 3; CR 3:Ex.D.27.) The NVCP estimates the maximum number of units possible for each property. A maximum of 112 ***residential*** units is permissible on these five properties. *Id.* The maximum number of residential units allocated to Petitioner's ranch is nine.[2] *Id.* The NVCP recommended rezoning Loma Alta from the A-60 (*A*gricultural, one unit per 60 acres) designation established in 1972 to ARP-60 (*A*gricultural-*R*esidential-*P*lanned, one unit per 60 acres). (CR 3:Ex.D:47.)

The new ARP zoning designation encouraged clustered development concentrated on a small portion of a property to enhance preservation of open space and agricultural land but did not increase or decrease the number of allowable units on Petitioner's property. (CR 3:Ex.D:42-43.) Petitioner's Loma Alta Ranch was rezoned from A-60 to ARP-60 in 1979 pursuant to the NVCP.

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[2] A number of other alternative uses are allowed on Petitioner's property including the conference center he proposed at one point. (See District Court Opinion [Appendix C to Petition, pp. C3 and C4]).

The other adjacent properties were also rezoned to the same or a reduced density than had previously existed in accordance with the Community Plan. (Ordinance 2418, County Addendum 5; CR 103:Ex. 12.)

4. The 1980 Purchase of the Property by Petitioner

Petitioner Barancik, a Chicago architect/developer, purchased the Loma Alta Ranch on January 16, 1980. (CR 39:4, 14.) Petitioner knew, at the time he purchased the property, the County's agricultural preservation policies and was aware that the property was zoned ARP-60 which permitted only nine residential units. (CR 39:4, 15-16; CR 103:Exs. 22, 23; CR 166:2.) The modest price of approximately $650,000 or $1,160 per acre (CR 39:4:14) was based on the residential density limits imposed by the County's agricultural zoning since 1972.

Despite repeated warnings from County officials and his own consultants that the County would not abandon its agricultural zoning in deference to a suburban type residential development at Loma Alta (CR 166:2; CR 39:2-16), Petitioner nevertheless embarked on a dogged campaign to triple the residential density specified for the property. (CR 103: Exs. 24, 26, 27, 16, 2: CR 166:2.) The County declined to accommodate him and this litigation ensued in 1985.

REASONS FOR DENYING THE WRIT

Certiorari should not be granted because:

A. The Petition does not engender any of the "special and important" reasons required for issuance of a writ by Supreme Court Rule 17.

B. The question posed by the Petition is academic because both the District and Circuit Courts have ruled that Petitioner's action is devoid of merit, irrespective of the statute of limitations issue.

C. The issues in this case narrowly apply to its unique facts.

D. The decision of the Ninth Circuit is plainly correct.

A. The Petition Does Not Satisfy The Requirements Of Supreme Court Rule 17

Petitioner is silent as to which of the "special and important reasons" set forth in Supreme Court Rule 17 he seeks to invoke. The Petition cites no decisions of the Supreme Court with which the Circuit Court decision conflicts, other than the claim, on page 14 of the Petition, that the decision is "adverse" to the ripeness doctrine. This contention is critically undermined by the fact that the Circuit Court actually ruled that "Barancik's petition is ripe for review." *Barancik v. County of Marin*, 872 F.2d 834, 836 (9th Cir. 1989); Appendix B to Petition, pp. B-3, B-8. Moreover, the asserted adversity, if it exists at all, is obviously a question of reconciliation, rather than a patent conflict.

The only other possible decisional conflict cited by Petitioner is another Ninth Circuit case, *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986) which is entirely consistent with the decision in this case. In *Norco*, the Court stated:

> "We conclude that under federal law the general rule is that claims for inverse taking, and for alleged related injuries from denial of equal protection or denial of due process by unreasonable delay or failure to act under mandated time periods, are not matured claims until planning authorities and state review entities make a final determination on the status of the property." *Id.* at p. 1145.

Here the final determination as to the use of the property was made by the County in 1979 and the statute of limitations then began to run, exactly in accordance with *Norco*.

B. The Question Posed By The Petition Is Academic

Petitioner urges this Court to determine whether the Circuit Court correctly applied the applicable statute of limitations. This is an exercise in sophistry because both the District Court and the Circuit Court found that the Petitioner's claims had no merit whatsoever. As the concurring opinion succinctly stated:

> "On the basis of the undisputed facts in the record, appellant could not prevail on any of his challenges to the county's original zoning, or to the county's rejection of plaintiff's

> request to treble the density permitted under that zoning." 872 F.2d 834 at 837; Appendix B to Petition, p. B-10.

Petitioner has not challenged the Court's determination that his claims have no merit. He has essentially abandoned these issues. *Collins v. City of San Diego,* 841 F.2d 337, 339 (9th Cir. 1988). Thus, even if the Supreme Court accepted Petitioner's hypothesis concerning the application of the statute of limitations, the case would still be dismissed.

As the Court stated in *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955):

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues."

To the same effect, in *The Monrosa v. Carbon Black Export, Inc.,* 359 U.S. 180 (1959), the Court observed:

> "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial."

C. The Issues In This Case Narrowly Apply To Its Unique Facts

A common denominator in most federal land use challenges, to the extent one can be ascertained, is an overt action by a regulatory agency which limits or circumscribes the existing rights of a property owner, e.g., *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987) and *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987).

In this instance, the local government has not initiated any action whatsoever. Petitioner purchased the property at a bargain price based on long standing zoning. The County only declined to support his quest to triple his investment by tripling the density of the property.

Petitioner's extraordinary assertion that the County is obliged to facilitate speculative aspirations is so far outside the mainstream of land use and planning jurisprudence that it is, by definition, *sui generis.*

D. The Decision Of The Ninth Circuit Is Plainly Correct

A precise delineation of the "continuing wrong doctrine" is contained in *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) wherein the Court observed:

> "Ward's reasoning is incorrect. A continuing violation is occasioned by continual unlawful acts, not by continual ill effects for an original violation."

The density of Petitioner's property was established in 1972. In 1979, the master plan and clustering requirements were superimposed on the property but the density, about which Petitioner complains, remained unchanged. There is absolutely no evidence of a continuing course of unlawful acts by Respondent County. Since Petitioner's purchase of the property in 1980, the County's role has been passive throughout.

Petitioner also contends that the continuing wrong doctrine should be applied because of the special equities of this case. (Petition, pp. 12-13.) Simply stated, the equities involve balancing Petitioner's attempt to triple his investment against the efforts of the County of Marin to protect irreplaceable agricultural lands from invidious urban encroachment. This is hardly an equitable mandate which compels suspension of the applicable statute of limitation.

The paucity of Petitioner's argument is further evident from his hypothetical (Petition, p.6) that a Black person could not, after the limitations period, challenge a zoning ordinance which excluded Black people from a neighborhood. This superficial argument is oblivious to the provisions of California Government Code Section 65008 (Appendix A) which provides, in pertinent part:

> "Any action pursuant to this title by any city, county, or city and county in this state which denies to any individual or group of individuals the enjoyment of residence, land owner-

> ship, tenancy, or any other land use in this state because of religious or ethnic reasons is null and void."

Petitioner's argument also ignores the extensive procedures California has enacted which allow property owners to challenge zoning decisions (California Government Code Section 65009, Appendix A) and which require periodic review of the housing element in a County's Master Plan, at intervals of not less than five years (California Government Code Section 65588, Appendix A) and which afford individuals the right to challenge the General Plan or any elements thereof (California Government Code Section 65751, Appendix A).

Thus, while the statute of limitations may, as it is properly intended to do, limit the time within which a landowner may sue under 42 U.S.C. Section 1983, landowners in California nonetheless enjoy an extensive arsenal of state remedies which satisfy the theoretical concerns propounded by Petitioner.

The contention (Petition, p.8) that the Circuit Court's decision will generate burdensome litigation is manifestly spurious. Quite the opposite is true. Fundamentally, Petitioner claims that zoning ordinances never become final but are eternally vulnerable to legal challenge every time ownership is transferred or a rezoning is sought. This concept is essentially a complete abrogation of any statute of limitations and would encourage incessant litigation over matters long since decided.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Dated: September 8, 1989

Respectfully submitted,

DOUGLAS J. MALONEY
County Counsel
Counsel of Record

ROBERT H. SAN CHEZ
Senior Deputy County Counsel

Attorneys for Respondent,
County of Marin

APPENDIX A

CALIFORNIA GOVERNMENT CODE SECTIONS

CALIFORNIA GOVERNMENT CODE SECTION 65008:

§ 65008. Discrimination; prohibition

(a) Any action pursuant to this title by any city, county, or city and county in this state which denies to any individual or group of individuals the enjoyment of residence, land ownership, tenancy, or any other land use in this state because of religious or ethnic reasons is null and void.

(b) No city, county, or city and county shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against any residential development or emergency shelter because of the method of financing or the race, sex, color, religion, national origin, ancestry, lawful occupation, or age of the owners or intended occupants of the residential development or emergency shelter.

(c) No city, county, or city and county shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against a residential development or emergency shelter because the development or shelter is intended for occupancy by persons and families of low and moderate income, as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income.

For the purposes of this section, "persons and families of middle income" means persons and families whose income does not exceed 150 percent of the median income for the county in which the persons or families reside.

(d) No city, county, or city and county may impose different requirements on a residential development or emergency shelter which is subsidized, financed, insured, or otherwise assisted by the federal or state governments or by a local public entity, as defined in Section 50079 of the Health and Safety Code, than those imposed on nonassisted developments, except as provided in subdivision (e).

(e) Nothing in this title shall be construed to prohibit a city, county, or city and county from extending preferential treatment to residential developments or emergency shelters assisted by the

federal or state governments or by a local public entity, as defined in Section 50079 of the Health and Safety Code, or other residential developments or emergency shelters intended for occupancy by persons and families of low and moderate income, as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income. This preferential treatment may include, but need not be limited to, reduction or waiver of fees or changes in architectural requirements, site development and property line requirements, building setback requirements, or vehicle parking requirements which reduce development costs of these developments.

(f) "Residential development," as used in this section, means a single family residence or a multifamily residence.

(g) This section shall apply to chartered cities.

The Legislature finds and declares that discriminatory practices which inhibit the development of housing for persons and families of low, moderate, and middle income, or emergency shelters for the homeless, are a matter of statewide concern.

CALIFORNIA GOVERNMENT CODE SECTION 65009:

§ 65009. Actions challenging local zoning and planning decisions; legislative findings; limitation of issues; time limitations; application of section

(a) (1) The Legislature finds and declares that there currently is a housing crisis in California and it is essential to reduce delays and restraints upon expeditiously completing housing projects.

(2) Legislature further finds and declares that a legal action challenging a decision of a city, county, or city and county has a chilling effect on the confidence with which property owners and local governments can proceed with projects. Legal actions filed to attack, review, set aside, void, or annul a decision of a city, county, or city and county pursuant to this division can prevent the completion of needed developments even though the projects have received required governmental approvals.

(3) The purpose of this section is to provide certainty for property owners and local governments regarding decisions made pursuant to this division.

(b) (1) In an action or proceeding to attack, review, set aside, void, or annul a finding, determination, or decision of a public agency made pursuant to this title at a properly noticed public hearing, the issues raised shall be limited to those raised in the public hearing or in written correspondence delivered to the public agency prior to, or at, the public hearing, except where the court finds either of the following:

(A) The issue could not have been raised at the public hearing by persons exercising reasonable diligence.

(B) The body conducting the public hearing prevented the issue from being raised at the public hearing.

(2) If a public agency desires the provisions of this subdivision to apply to a matter, it shall include in any public notice issued pursuant to this title a notice substantially stating all of the following: "If you challenge the (nature of the proposed action) in court, you may be limited to raising only those issues you or

someone else raised at the public hearing described in this notice, or in written correspondence delivered to the (public entity conducting the hearing) at, or prior to, the public hearing."

(3) The application of this subdivision to causes of action brought pursuant to subdivision (d) applies only to the final action taken in response to the notice to the city or county clerk. If no final action is taken, then the issue raised in the cause of action brought pursuant to subdivision (d) shall be limited to those matters presented at a properly noticed public hearing or to those matters specified in the notice given to the city or county clerk pursuant to subdivision (d), or both.

(c) Except as provided in subdivision (d), no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 120 days after the legislative body's decision:

(1) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a general or specific plan. This paragraph does not apply where an action is brought based upon the complete absence of a general plan or a mandatory element thereof, but does apply to an action attacking a general plan or mandatory element thereof on the basis that it is inadequate.

(2) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance.

(3) To determine the reasonableness, legality, or validity of any decision to adopt or amend any regulation attached to a specific plan.

(4) Concerning any of the proceedings, acts, or determinations taken, done, or made prior to any of the decisions listed in paragraphs (1), (2), and (3).

(d) An action or proceeding shall be commenced and the legislative body served within two years after the accrual of the cause of action as provided in this subdivision, if the action or proceeding meets both of the following requirements:

(1) It is brought in support of the development of housing projects which meet the requirements for housing for persons and families with low or moderate incomes set forth in Section 65915.

(2) It is brought with respect to actions taken pursuant to Article 10.6 (commencing with Section 65580) of Chapter 3 of this division, pursuant to Section 65589.5, 65863.6, 65915, or 66474.2 or pursuant to Chapter 4.2 (commencing with Section 65913).

A cause of action brought pursuant to this subdivision shall not be maintained until 60 days have expired following notice to the city or county clerk by the party bringing the cause of action, or his or her representative, specifying the deficiencies of the general plan, specific plan, or zoning ordinance. A cause of action brought pursuant to this subdivision shall accrue 60 days after notice is filed or the legislative body takes a final action in response to the notice, whichever occurs first. A notice or cause of action brought by one party pursuant to this subdivision shall not bar filing of a notice and initiation of a cause of action by any other party.

(e) Upon the expiration of the time limits provided for in this section, all persons are barred from any further action or proceeding.

(f) Notwithstanding Section 65700, this section shall apply to charter cities.

(g) Except as provided in subdivision (d), this section shall not affect any law prescribing or authorizing a shorter period of limitation than that specified herein.

(h) This section shall be applicable to those decisions of the legislative body of a city, county, or city and county made pursuant to this division on or after January 1, 1984.

CALIFORNIA GOVERNMENT CODE SECTION 65588:

§ 65588. Review and revision

(a) Each local government shall review its housing element as frequently as appropriate to evaluate all of the following:

(1) The appropriateness of the housing goals, objectives, and policies in contributing to the attainment of the state housing goal.

(2) The effectiveness of the housing element in attainment of the community's housing goals and objectives.

(3) The progress of the city, county, or city and county in implementation of the housing element.

(b) The housing element shall be revised as appropriate, but not less than every five years, to reflect the results of this periodic review.

In order to facilitate review by the department of housing elements, local governments following shall prepare and adopt the first two revisions of their housing elements no later than the dates specified in the following schedule, notwithstanding the date of adoption of the housing elements in existence on the effective date of the act which amended this section during the 1983-84 session of the Legislature.

(1) Local governments within the regional jurisdiction of the Southern California Association of Governments: July 1, 1984, for the first revision and July 1, 1989, for the second revision.

(2) Local governments within the regional jurisdiction of the Association of Bay Area Governments: January 1, 1985, for the first revision, and July 1, 1990, for the second revision.

(3) Local governments within the regional jurisdiction of the San Diego Association of Governments, the Council of Fresno County Governments, the Kern County Council of Governments, the Sacramento Council of Governments, and the Association of Monterey Bay Area Governments: July 1, 1985, for the first revision, and July 1, 1991, for the second revision.

(4) All other local governments: January 1, 1986, for the first revision, and July 1, 1992, for the second revision.

(5) Subsequent revisions shall be completed not less often than at five-year intervals following the second revision.

(c) The review and revision of housing elements required by this section shall take into account any low- or moderate-income housing which has been provided or required pursuant to Section 65590.

(d) The review pursuant to subdivision (c) shall include, but need not be limited to, the following:

(1) The number of new housing units approved for construction within the coastal zone after January 1, 1982.

(2) The number of housing units for persons and families of low or moderate income, as defined in Section 50093 of the Health and Safety Code, required to be provided in new housing developments either within the coastal zone or within three miles of the coastal zone pursuant to Section 65590.

(3) The number of existing residential dwelling units occupied by persons and families of low or moderate income, as defined in Section 50093 of the Health and Safety Code, that have been authorized to be demolished or converted since January 1, 1982, in the coastal zone.

(4) The number of residential dwelling units for persons and families of low or moderate income, as defined in Section 50093 of the Health and Safety Code, that have been required for replacement or authorized to be converted or demolished as identified in paragraph (3). The location of the replacement units, either onsite, elsewhere within the locality's jurisdiction within the coastal zone, or within three miles of the coastal zone within the locality's jurisdiction, shall be designated in the review.

CALIFORNIA GOVERNMENT CODE SECTION 65751:

§ 65751. Writ of mandate

Any action to challenge a general plan or any element thereof on the grounds that such plan or element does not substantially comply with the requirements of Article 5 (commencing with Section 65300) shall be brought pursuant to Section 1085 of the Code of Civil Procedure.

No. 89-318

Supreme Court, U.S.
FILED
SEP 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD M. BARANCIK

Petitioner,

v.

COUNTY OF MARIN,
a Subdivision of the State of California

Respondent.

PETITIONER'S REPLY MEMORANDUM

CHARLES L. SIEMON*
BRIAN W. BLAESSER
SIEMON, LARSEN & PURDY
Dearborn Station
47 W. Polk Street
Chicago, Illinois 60605
(312) 939-7117
Counsel for Petitioner
*Attorney of Record

Of Counsel
BEYERS, COSTIN & CASE
917 College Avenue
PO Box 878
Santa Rosa, California 95402
(707) 545-0142

September 28, 1989

Pandick Midwest, Inc., Chicago • (312) 733-6000

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD M. BARANCIK

Petitioner,

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COUNTY OF MARIN,
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Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

INTRODUCTION

In this cause Petitioner seeks a Writ of Certiorari to review a decision of the Ninth Circuit Court of Appeals holding that in an action brought under 42 U.S.C. § 1983 challenging an existing zoning classification, the cause of action accrues from the date the zoning classification was originally adopted, and not from the date the landowner's rezoning request was denied. The Ninth Circuit's time bar rule on this important question of federal law has such severe implications for property owners that Respondent's characterization of the question as "academic" is appalling and can only be described as disingenuous. As applied in Petitioner's case and as will be applied in all future cases,

property owners will be *forever* barred from challenging an existing zoning classification on its face and as it applies to their property vis a vis surrounding properties. If allowed to stand, the Ninth Circuit's decision will establish a federal rule that will encourage local governments to act with impunity, knowing that an unconstitutional ordinance which has been in existence for one year, can never be challenged. For property owners who sue under Section 1983 after denial of a development request, the court's time bar rule deprives them of all causes of action except an "as applied" substantive due process claim. This federal rule of time limitations thus undermines the fundamental purpose of the Civil Rights Act of 1871 which was to guarantee an *effective* means to redress deprivations of constitutional rights.

ARGUMENT

The Supreme Court is the national expounder of federal law. A court of appeals decision which establishes a federal statute of limitations rule under *Wilson v. Garcia*, 471 U.S. 261 (1985) that deprives a property owner of both facial and as applied causes of action to challenge a final development decision rendered by a local government, is an important federal question of national significance. No other federal circuit but the Ninth Circuit has articulated this draconian proposition of law under 42 U.S.C. §1983. Indeed, the Ninth Circuit's rule conflicts with at least two other circuits who have addressed the statute of limitations issue under 42 U.S.C. §1983. *See Ocean Acres Limited Partnership v. Dare County Board of Health*, 707 F.2d 103 (4th Cir. 1983); *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978). The Ninth Circuit's rejection of the applicability of the continuing wrong doctrine in the context of land use disputes places it alone and in conflict with these other circuits who have considered this question.

No other federal circuit has decided the federal statute of limitation question under 42 U.S.C. §1983 so as to deprive a plaintiff property owner of virtually all of his causes of action against the wrongful zoning of his property. The question to be reviewed is one of *general* importance to the rights of all property owners who seek to redress deprivations of their constitutional rights under the federal Civil Rights Act. Respondent's citation to *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959) are inapposite in that they merely stand for the unremarkable proposition that certiorari may be dismissed as improvidently granted if circumstances come to light which were not fully apprehended

at the time the certiorari was granted. *See The Monrosa v. Carbon Black Export, Inc., supra* at 183.[1]

The foregoing are all reasons which are "special and important" within language of Supreme Court Rule 17 for issuance of a writ. Respondent's effort to trivialize the national significance of this constitutional question is unavailing. Indeed, as Respondent well knows, Rule 17 by its own terms states that the considerations outlined in Rule 17 are neither "controlling nor fully measuring [of] the Court's discretion." Supreme Court Rule 17.1.

Moreover, it is nonsensical for Respondent to suggest that there is no fundamental doctrinal conflict between the Ninth Circuit's belated ruling in its amended opinion that Petitioner's claims were, in fact "ripe" for review, and its simultaneous barring of those same claims by an illogical statute of limitations rule under 42 U.S.C. § 1983. The clash of the Ninth Circuit's limitations rule under 42 U.S.C. § 1983 with the Supreme Court's ripeness doctrine can only be resolved by this Court serving as the final arbiter.[2]

The danger of allowing the Ninth Circuit's time bar rule to become established federal law is revealed in Respondent's incredible assertion at page 6 of its Brief that its regulations are *immune* from constitutional challenge so long as it does

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[1] Respondent also suggests, erroneously, that Petitioner has "abandoned" his claims on the merits, ignoring this Court's pronouncement in *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) that the purpose of a Petition for Certiorari is not to review a conflict of evidence and similar matters. It hardly follows, therefore, that Petitioner has abandoned these issues.

[2] The passage from *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986) cited by Respondent (Respondent's Brief p. 5) refers to a final determination of a specific development proposal. It hardly stands for the proposition that the County's rezoning of the Loma Alta Ranch in 1979, *before* Petitioner even purchased the property, should start the statute of limitations running. *See* Petition at p. 9 n. 5.

not initiate any change in those regulations as they apply to a landowner's property. Such a proposition of law strikes at the heart of this Court's pronouncement in *Village of Euclid, Ohio v. Ambler Realty Company*, 272 U.S. 365 (1926), that a landowner has a constitutional right to challenge a zoning ordinance which, by its mere existence, invades his or her property rights. *See also Terrace v. Thompson*, 263 U.S. 197 (1923).

The events outlined in the Petition from the record below, belie Respondent's attempt to suggest that its role during the five year dispute was "passive" throughout. *See* Petition, pp. 12-14. *See also Jordan v. Rocco*, 648 F.Supp. 942, 946 (N.D. Ohio 1986). Moreover, Respondent's citation to the California government Code outlawing discrimination by local units of government indicates an extraordinary failure to understand that the Civil Rights Act of 1871, 42 U.S.C. § 1983, was adopted by Congress to guarantee the effective enforcement of *constitutional rights*. This Court recently underscored this crucial distinction in *Felder v. Casey*, 487 U.S. ___, 101 L. Ed. 2d 123, 144 (1988), stating:

> [T]he dominant characteristic of civil rights actions [is that] *they belong in court*. "These causes of action," we have explained, "exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable *in the first instance*." (citations omitted) (emphasis, the Court's).

The time bar rule under 42 U.S.C. § 1983 established by the Ninth Circuit is a rule of constitutional dimension for jurisdictions throughout the circuit and potentially throughout the nation. For this reason, it is hardly adequate to cite to a local state remedy as ameliorating the constitutional deprivation suffered by property owners at the hands of local government—the very wrong which Congress intended to correct by its passage of the Civil Rights Act of 1871.[3]

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[3] See CONG. GLOBE, 42nd Cong., 1st Sess. at 334.

CONCLUSION

For all of the foregoing reasons Petitioner respectfully prays that this Honorable Court grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision in this case.

Respectfully submitted,

CHARLES L. SIEMON
BRIAN W. BLAESSER
SIEMON, LARSEN & PURDY
Dearborn Station
47 W. Polk Street
Chicago, Illinois 60605
312/939-7117